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IN THE

Supreme Court of the United States

October Term, 1957

No. 976

JOHN A. SEALY, JR., ET AL.,
Petitioners

v.

DEPARTMENT OF PUBLIC INSTRUCTION
OF PENNSYLVANIA, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

JOHN A. SEALY, JR., and MARVA SEALY, minors, by their Guardians, JOHN A. SEALY and PLEASANT E. SEALY, h/w; and JOHN A. SEALY and PLEASANT E. SEALY, h/w, in their own right

HELEN C. BERRY, a minor, by her Guardians, JOSEPH BERRY and CAMILLE BERRY, h/w; and JOSEPH BERRY and CAMILLE BERRY, h/w, in their own right

WILLIAM L. H. WALLER, JR., a minor, by his Guardians, WILLIAM L. H. WALLER, SR., and DELLA ODESSA WALLER, h/w; and WILLIAM L. H. WALLER, SR., and DELLA ODESSA WALLER, h/w, in their own right

MARY CATHERINE SIMMONS, a minor, by her Guardian, MRS. BONNIE SIMMONS; and MRS. BONNIE SIMMONS, in her own right

v.

DEPARTMENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, DR. CHARLES H. BOEHM, *Supt. of Public Instruction*

STATE PUBLIC SCHOOL BUILDING AUTHORITY OF PENNSYLVANIA

STATE COUNCIL OF EDUCATION OF PENNSYLVANIA

BOARD OF SCHOOL DIRECTORS OF DELAWARE COUNTY, G. BAKER THOMPSON, *Superintendent of Public Schools of Delaware County, Pa.*

(Continued on next page)

CHARLES H. RUSSELL, NORMAN K. SEIPLE, *President*, H. LETCHER COOPER, EDITH J. ZARR, THEODORE S. FETTER, L. G. LIVINGSTON

SCHOOL DISTRICT OF DARBY TOWNSHIP, BOARD OF SCHOOL DIRECTORS OF THE SCHOOL DISTRICT OF DARBY TOWNSHIP, PA., JAMES E. STEPHENS, JOHN F. READY, THOMAS V. STUDEVAN, THOMAS J. REILLY, JOHN W. PHILLIPS, WILLIAM H. POLK, JR., MRS. ROSALIE RUPERT, DONALD L. SNIVELY

SCHOOL DISTRICT OF FOLCROFT BOROUGH, BOARD OF SCHOOL DIRECTORS OF THE SCHOOL DISTRICT OF FOLCROFT BOROUGH, PA., DOROTHY GREENLAW, E. E. PARKIN, RICHARD C. PALMER, GEORGE F. HOFMAN, ROBERT KELLY, SAMUEL D. CRAVEN, *Supervising Principal, Folcroft Public School, Folcroft, Pa.*

SCHOOL DISTRICT OF SHARON HILL BOROUGH, BOARD OF SCHOOL DIRECTORS OF THE SCHOOL DISTRICT OF SHARON HILL BOROUGH, PA., NORMAN K. SEIPLE, JOSEPH S. WEAVER, FRANK A. YEAGER, EDWARD C. CALLAHAN, WILLIAM L. HEESEN, WILLIAM H. EGGERS, FRANKLIN J. KOCH, DR. VERNON H. W. DESSENBERGER, *Supervising Principal, Sharon Hill Public School, Sharon Hill, Pa.*

SCHOOL DISTRICT OF COLLINGDALE BOROUGH, BOARD OF SCHOOL DIRECTORS OF THE SCHOOL DISTRICT OF COLLINGDALE BOROUGH, PA., JOHN H. ALEXANDER, WILFRED OTTY, WILLIAM PARTRIDGE, ALFRED B. CAWTHRONE, JAMES D. MCBRIDE, DR. RAYMOND C. SAALBACH, F. E. STENGLE, *Superintendent, High School, Collingdale, Pa.*

SCHOOL DISTRICT OF COLWYN BOROUGH, BOARD OF SCHOOL DIRECTORS OF THE SCHOOL DISTRICT OF COLWYN BOROUGH, PA., JOSEPH H. BREHM, JR., JOHN L. FURTERER, CLAYTON H. LATSHAW, CHARLES G. HILD, JOSEPH ARCHIBALD, DE WITT L. DIETRICH, *Principal, Colwyn Public School, Colwyn, Pa.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered February 5, 1958, and amended March 14, 1958, in the above entitled cause.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (case No. 12,438) is reported at F. 2d and is printed as Appendix B, infra, page 37. The opinion of the District Court for the Eastern District of Pennsylvania handed down on August 27, 1957, with Findings of Fact and Conclusions, denying petitioners motion for injunction is reported at F. Supp. , and is printed in Appendix A, infra, page 17. The judgment of the District Court, entered September 7, 1957, denying petitioners application for a preliminary injunction and final injunction, and granting judgment in favor of defendants and against plaintiffs (petitioners herein); dismissing plaintiffs' complaint and granting final judgment as to the Public School Building Authority of Pennsylvania, The School District of Darby Township, The Board of School Directors of Darby Township, the members of said Board, and the Supervising Principal, with costs; and retaining jurisdiction over all of plaintiffs' claims for relief not the subject of this order, is printed in Appendix A, infra, page 27.

The order of the United States Court of Appeals for the Third Circuit, entered March 14, 1958, amending the opinion of February 5, 1958, is printed in Appendix B, infra, page 43.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 5, 1958. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Title 28, United States Code, Section 1257(3), petitioners having asserted in the courts below, rights, privileges and immunities conferred by the Constitution and laws of the United States.

QUESTIONS PRESENTED

I.

Whether the Court Below decided the question of racial discrimination in a way in conflict with the decisions of the Supreme Court of the United States requiring the elimination of racial discrimination in the public schools with all deliberate speed.

II.

Whether the United States Court of Appeals Below should have reversed the judgment of the United States District Court Below to the effect that the relief sought by the plaintiffs (petitioners herein) was multiple and there was no just reason for delay, on the grounds that the said District Court abused its discretion.

III.

Whether the courts below decided this case in a way contrary to the decision of another United States Court of Appeals, in that the courts below did not retain jurisdiction

of all issues and all defendants pending full implementation of an intergrated public school plan.

IV.

Where the county plan for the reorganization of administrative units and attendance areas and the proposal for the construction of school facilities conforming therewith, were both before the District Court Below on the issue racial discrimination, should the court have dismissed the case so as to permit the facilities to be constructed and, at the same time, delay its decision on the constitutionality of the county plan notwithstanding the fact that all the evidence was before the court on all issues.

STATEMENT OF THE CASE

This is a civil action instituted by five Negro children and their parents, residents and taxpayers in Darby Township, Delaware County, Pennsylvania, seeking to enjoin the implementation of the Delaware County Plan for the reorganization of Administrative Units and Attendance Areas and the construction of a junior high school conforming therewith in Darby Township. The plaintiffs alleged that the County Plan and the proposed junior high school thereunder were racially discriminatory and therefore in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

There was in existence a County Plan for the reorganization of school districts into administrative units and attendance areas in Delaware County, which was formulated and promulgated by the County Board of School Directors, through the office of the Superintendant of Public Schools of Delaware County and approved by the Pennsylvania State Council of Education and the Department of Public Instruction of Pennsylvania, defendants herein.

Under the said County Plan for Delaware County, Administrative Unit Number Five combined together for administration and attendance purposes the Public School Districts of the Boroughs of Folcroft, Sharon Hill, Collingdale and Colwyn. The Plan combined for administration and attendance purposes the Public School Districts of Darby Township and Darby Borough.

The Boroughs of Folcroft, Sharon Hill, Collingdale, Colwyn and Darby and the school districts which are geographically coextensive with them, together with other municipalities not involved in this case, were all carved out of the territory which was originally incorporated as Darby Township. As a result of this separation by incorporation of boroughs, all that remains of Darby Township is two non-contiguous sections separated by the Boroughs of Folcroft, Sharon Hill, Collingdale and Glenolden. The upper or northern section of Darby Township is separated from Darby Borough by Collingdale, while the lower or southern section is separated from Darby Borough by Sharon Hill and Colwyn. The combined area of these two sections of Darby Township is one and one-half square miles.

According to the United States Census of 1950, the Negro population of Darby Borough was 14%; of Darby Township, lower section, 89.3%; Darby Township, upper section, 47.2%; Folcroft, 0.8%; Colwyn, 0.8%; Sharon Hill, 0.4%; and Collingdale, 0.1%. Since the 1950 census there has been no substantial change in the racial composition of the population of the various municipalities with the exception of Darby Township in which by the end of 1956 the Negro population of the upper section was about 5%; and the lower section, 95%.

The Boroughs of Sharon Hill, Collingdale and Darby have complete school systems, elementary through high school; whereas Darby Township, Folcroft, and Colwyn have only elementary and junior high schools. Darby Town-

ship has two elementary schools, one in the upper and one in the lower section, and a junior high school which is located in the lower section.

The plaintiffs alleged that the said County Plan amounted to racial discrimination by means of the gerrymandering of school districts based upon race. The officials of Darby Township School District and the officials on the County and State levels approved the construction of a junior high school in the upper section of Darby Township in conformity with the County Plan which would have necessitated the passing of predominantly white schools by the Negro students living in the lower section of Darby Township, in order to attend said school.

The District Court Below heard testimony on the plaintiffs' prayer for a preliminary and final injunction to restrain the defendants from implementing the County Plan and building the Junior High School in conformity therewith. The said court handed down an opinion on August 27, 1957, F. Supp.

On September 9, 1957, the said Court entered an Order and judgment wherein it was stated that the relief sought by the plaintiffs was multiple and that the construction of the junior high school was unrelated to the other relief prayed for by the plaintiffs; and that there was no just reason for delay. The order and judgment denied plaintiffs' application for a preliminary and final injunction to restrain any or all of the defendants from taking any action contemplated or deemed necessary in connection with the construction of the proposed junior high school in the upper section of Darby Township and in favor of all defendants. The order further dismissed the plaintiffs' complaint as to the Pennsylvania Public School Building Authority and entered a judgment in favor of the School District of Darby Township and the various officials of the said school district and dismissed plaintiffs' complaint as to them.

The said order of September 9, 1957,[1] further set forth that the court retained jurisdiction over all plaintiffs' claims for relief which were not the subject of said final order and judgment pursuant to Rule 54(b), Fed. R. Civ. Proc., 28 U. S. C.

The plaintiffs below, petitioners herein, appealed from the District Court's Order of September 9, 1957 to the United States Court of Appeals for the Third Circuit and on February 5, 1958 the said appellate court handed down an opinion and judgment affirming the District Court's decision.

The petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit, entered February 5, 1958 in the above entitled cause.

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[1] The District Court Below entered another judgment on December 19, 1957 in favor of the defendants and against the plaintiffs on the grounds that the County Plan was a moot question in view of the fact the State Council of Education had disapproved the County Plan. On February 26, 1958 the State Council of Education of Pennsylvania approved a new Delaware County Plan which provided for the combination of all the school districts which were in administrative units five and nine under the old county plan, into one administrative unit number five, but they failed to designate junior high school attendance areas or indicate where the junior high schools would be located, except that there would be three junior high schools for the entire administrative unit. At the time of the approval of the new plan the County Superintendent of Public Schools presented a map showing the location of three junior high schools, one in Darby Borough, one in Collingdale Borough and one in the upper section of Darby Township. The map did not indicate the location of a junior high school below the Collingdale, Darby Borough line, which lower portion encompasses Sharon Hill, Colwyn, Folcroft and the lower section of Darby Township. On April 29, 1958, the plaintiffs docketed their appeal from the District Court's decision of December 19, 1957, in the United States Court of Appeals for the Third Circuit, case number 12,603, and the matter is now pending before said appellate court.

ARGUMENT

I.

The Court Below decided a question on racial discrimination in a way in conflict with the decision of this Court requiring elimination of racial discrimination in the public schools with all deliberate speed. *Brown v. Board of Education of Topeka*, 349 U. S. 294. The District Court Below should have retained jurisdiction of all issues and all parties in the entire case by ordering the withdrawal of the old plan and the issuance and implementation of a plan on a non-racial or intergrated basis. At the time it rendered its decision of August 27, 1957, the District Court had before it all the evidence with respect to all issues in the case but, nevertheless, failed to render an opinion regarding the constitutionality of the Delaware County Plan. In its order and judgment of September 7, 1957, the Court below again failed to render a decision with respect to the constitutionality of the County Plan. Again on December 19, 1957, the District Court failed to render a judgment with regard to the constitutionality of the County plan on the grounds that it was a moot question because the plan had been disapproved. At no point in the proceedings, however, in the District Court Below did the defendants present an approved county plan free of racial discrimination.

It is clear from the geographical relationship of the various school districts, in view of their racial composition, that gerrymandering was effected by the incorporation of the various boroughs which reduced Darby Township into two small non-c ntiguous sections and separated them from each other. This racial discrimination by means of incorporation isolated and separated the Negro population in Darby Township and the County Plan compounded the patent segregation pattern by joining the two sections of Darby Township with Darby Borough, the only other school district in the vicinity with a substantial Negro population.

Faced with this distinct segregation pattern, the County Plan did not become a moot question upon the mere disapproval thereof. This Court pointed out in *Brown v. Board of Education of Topeka*, 349 U. S. 294, that full implementation of the fundamental principle that racial discrimination in public education is unconstitutional, may require the solution of varied local school problems the solution of which is the responsibility of school authorities. This Court further held that the Courts may consider problems related to administration, arising from the physical condition of the school plant and revision of school "districts and attendance areas" into compact units to achieve a system of determining admission to the public schools irrespective of race.

It is clear from the foregoing that the District Court below failed to carry out the orders of this Court when it withheld a decision on the school plan and dismissed the action regarding the school plant.

II.

The District Court Below abused its discretion in holding in its opinion of August 27, 1957, and order and judgment of September 7, 1957, that the relief sought by the plaintiffs (petitioners herein) was multiple and there was no just reason for delay. The Court held that the location and construction of the proposed junior high school was "unrelated" to the other relief sought by the plaintiffs which related primarily to the administrative units and attendance areas under the County Plan. This was clearly erroneous in view of the admissions of the defendants before the said court. While the interrelationship of the school buildings and the County Plan is fully set out in the record of the District Court, the Official Opinion No. 10, September 20, 1957, of the Attorney General of Pennsylvania, Department of Justice, Harrisburg, Pa.,[2] which is set forth in full in foot note number 2 below, removes any possible doubt.

Footnote No. 2

DEPARTMENT OF JUSTICE
Harrisburg, Pa.

September 20, 1957.

OFFICIAL OPINION No. 10

Honorable Charles H. Boehm,
Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

SIR:

You have requested our opinion on whether the State Council of Education may reconsider and revoke its prior approval of a county plan without such reconsideration and revocation being requested by the county board of school directors. No specific facts are stated in your memorandum requesting this advice. Therefore, we shall consider the question in all of its aspects.

The phrase "county plan" is nowhere defined in the statutes of the Commonwealth. However, it appears in §2576 of the "Public School Code of 1949" in reference to approval by the Department of Public Instruction of leases between a school district and the State Public School Building Authority and of payments by the school district of certain charges for school buildings. Approval is to be given if the project being considered:

> ". . . is in conformance with county-wide plans prepared by the county board of school directors and approved by the State Council of Education for the orderly development of improved attendance areas and administrative units and for the improved housing of public schools in the Commonwealth. . . ."

This use of the phrase appears to be directly connected to §§261 and 262 and §§733 to 735 of the Code relating to review and approval or disapproval by the Council of plans submitted by county boards of school directors for the merger of school districts and for the reorganization of administrative units and attendance areas and to the establishment by the Council of standards for the construction, heating and ventilation of public school buildings. Thus, your question specifically appears to refer to the Council's power of review under §§261 and 262 and whether approval, once given, can be reconsidered and revoked.

It should be noted that once the Council has approved such plans

Since the finding of the District Court below was clearly erroneous, the Court of Appeals Below should have reversed it, in view of the well established principle that the finding is clearly erroneous when the reviewing court on the entire record arrives at a definite and confirmed conviction that a mistake has been committed. *United States v. United Gypsum Company*, 333 U. S. 364.

The Appellate Court below stated in its opinion of February 5, 1958, page 5, line 13, "Segregation or discrimination is not shown by the mere fact that there are presently more Negro students in the lower or southern segment of Darby Township than in its upper or northern

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submitted by a county board of school directors, the latter group is to present petitions for merger to the court of common pleas of the county and to request therein submission of the question of merger to the electors of each affected school district.

Nothing in existing law prohibits the Council from reconsidering a plan. However, since a definite statutory procedure exists which contemplates submission to the electorate after approval of the Council is once given, it is our opinion that reconsideration cannot be had after approval of the plan by the electorate. At this point the action of the Council has become fixed for the plan is to become effective on the first Monday in July succeeding the election. This statutory provision would be nullified were the Council able to reconsider and effectually disapprove a plan.

You are advised, therefore, as follows: (1) the State Council of Education may, without being so requested by the county board of school directors, reconsider and either reapprove or disapprove a "county plan" which it had previously approved to the extent that all or part of such plan has not been approved by the electorate subsequent to the Council's initial approval; (2) to the extent that all or part of a "county plan" has been approved by the electorate following initial approval by the Council, it cannot be reconsidered by the Council.

Very truly yours,

DEPARTMENT OF JUSTICE,
ELMER T. BOLLA,
Deputy Attorney General.
THOMAS D. McBRIDE,
Attorney General.

segment. Standing alone such a factor will not support an inference of discrimination or segregation." However, contrary to the foregoing quotation the "mere fact" did not stand alone but was presented along with the County Plan and other factors from which an inference of discrimination or segregation should have been drawn.

III.

The Court of Appeals Below decided this case in a way contrary to the decision of the United States Court of Appeals for the Sixth Circuit in *Clemons v. The Board of Education of Hillsboro*, 228 F. 2d 853, January 5, 1956, wherein the court stated at page 856 "The district Court held that the establishment for the first time in Hillsboro of a zoning system with a gerrymandered school district set up in two separate parts, designed to embrace practically the entire Negro population of the city, was brought about as a subterfuge to segregate children who had been admitted to Webster and Washington Schools. This is a violation of the laws of Ohio. *Board of Education v. State*, 45 Ohio State 555, 16 N. E. 373; *Board of Education of School District of City of Dayton v. State ex rel. Reese*, 114 Ohio St. 188, 151 N. E. 39. It was in violation of the decision of the Supreme Court of the United States and of the Constitution of the United States."

The Court of Appeals of the Sixth Circuit further said at page 857, "The majority of the Court further held that the Board abused its discretion and violated State and Constitutional Laws in establishing the zoning ordinance and assigning the plaintiffs to segregated schools, and that the District Court abused its discretion in refusing to enjoin the continued violation of the laws."

The District Court Below at first withheld a decision on the County Plan which patently consolidated a segregation pattern by incorporation even though all the evidence was before it; and finally dismissed the action when the State Council of Education withdrew its approval, on the

grounds that it was a moot question. This was done notwithstanding the fact that a new plan had not been adopted which would revise the school districts into compact units so as to determine admission to the public schools on a nonracial basis.

The Appellate Court below went contrary to the decision of the United States Court of Appeals for the Sixth Circuit when it failed to reverse the decision of the District Court below.

IV.

The District Court Below abused its discretion under Rule 54(b), Fed. R. Civ. Proc., 28 U. S. C., in its opinion of August 27, 1957 and order and judgment of September 7, 1957 in holding that the plaintiffs' prayer for relief was multiple and there was no just reason for delay, when it was clear upon the record that the County Plan and school construction thereunder were both before the Court. The proposed junior high school was to be constructed by the Pennsylvania Public School Building Authority and leased to Darby Township School District. The Attorney General of Pennsylvania, in his Official Opinion No. 10, September 20, 1957, in the second paragraph, states that such leases to be approved must be in conformance with county wide plans prepared by the county board of school directors and approved by the State Council of Education for the orderly development of improved attendance areas and administrative units and the improved housing of public schools in the Commonwealth, Act of March 10, 1949, P. L. 30, as amended, 24 P. S. Section 25-2576. The Attorney General further stated in the opinion that the use of the aforementioned phraseology appears to be directly connected to Section 261 and 262 and Sections 733 to 735 (Act of March 10, 1949, P. L. 30, P. S. Sections 2-261 and 2-262 and Sections 7-733 to 7-735) relating to review and approval by the State Council of Education of county plans for the merger or reorganization of school districts into administrative units and

attendance areas and to the establishment by the Council of standards for the construction, heating and ventilation of public school buildings.

The Attorney General further pointed out that the question with respect to the county plan appeared to refer to the State Council's power of review under Sections 261 and 262, above mentioned.

A letter from the Department of Public Instruction of Pennsylvania which was offered in evidence in the District Court below and marked P-5, states that the proposed junior high for Darby Township, is in conformity with the County Plan approved by the State Council of Education under the provisions of Section 261 above referred to.

Dr. Herbert E. Bryan, Director of the Bureau of School District Organization and Director of the Bureau of Leadership and Educational Planning in the Department of Public Instruction of Pennsylvania testified in the District Court Below (see page 11a of appellants' appendix attached to the certified copy of the record) that the County Plan for administrative units and attendance areas takes into consideration the center of the attendance area which center is a school building. Dr. Bryan further testified that the primary purpose of the County Plan is to bring together school districts so that they can operate schools more efficiently, and by that meaning that they can furnish the educational facilities which they themselves could not afford to provide if acting independently.

G. Baker Thompson, County Superintendent of Schools for Delaware County, testified before the District Court Below (See certified copy of the record, page 62a of Appellants' Appendix) one of the benefits which accrues to a school district in adopting or acting in conformity with a county plan was the approval of school buildings.

Petitioners submit that the question of the constitutionality of the County Plan was so intertwined with the question of the construction of the proposed junior high school that the District Court below abused its discretion in holding that the relief sought by the plaintiffs below

(petitioners herein) was multiple and there was no just reason for delay.

Rule 54(b), Fed. R. Civ. Proc., 28 U. S. C., was intended to avoid piecemeal appeals so as to expedite rather than prolong litigation. *Packard Motor Car Co. v. Gem Manufacturing Company*, 187 F. 2d 65, certiorari dismissed, 342 U. S. 802.

It was further held in another case that the rule authorizing entry of separate judgments on different claims presented in an action, was intended to suggest that district courts sparingly exercise their jurisdiction thereunder, and thereby minimize piecemeal appeals. *Interborough News Co. v. Curtis Publishing Co.*, D. C. N. Y. 1954, 127 F. Supp. 286.

In *People of State of California v. U. S.*, 235 F. 2d 647, the appellate court said that the district court erred in entering final judgment for the plaintiff and against the water company without determining whether the uses to which the water was put by the plaintiff were valid as compared with the company's inchoate appropriative right in relation to the United States and other riparian landowners.

Petitioners submit that, in the light of the foregoing authorities, that the District Court Below abused its discretion under Rule 54(b) and the appellate court should have reversed its decision, Rule 52(a).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and judgment reversed.

Respectfully submitted,

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APPENDIX "A"

Opinions, Judgments and Orders In the United States District Court for the Eastern District of Pennsylvania

OPINION SUR PLEADINGS AND PROOF WITH FINDINGS OF FACT AND CONCLUSIONS DENYING MOTION FOR INJUNCTION

SUR PLEADINGS AND PROOF

GANEY, *J.* August 27, 1957

Upon the hearing in the application for the inunction, the Court makes the following

FINDINGS OF FACTS

1. Delaware County is divided into forty-nine political subdivisions of various sizes and classifications.

2. The Township of Darby, originally consisting of a substantially larger area than presently, was incorporated in the year 1683. The Borough of Darby was incorporated out of the Township of Darby in 1853, and the Borough of Colwyn in 1892, and, likewise, the Borough of Folcroft in 1922. The Borough of Collingdale was incorporated out of the Borough of Darby in 1891, and Sharon Hill out of the same Borough in 1890, and the Boroughs of Darby, Collingdale, Sharon Hill, Colwyn and Folcroft became independent school districts.

3. As a result of the formation of the above named Boroughs, the Township and School District of Darby, as now geographically constituted in two non-contiguous sections, have been in existence since 1890, the upper section thereof comprising Wards 3, 4 and 5 is separated from the lower section thereof, comprising Wards 1 and 2, by the Boroughs of Collingdale, Sharon Hill and Folcroft.

4. The 1950 census for Darby Township indicated that eighty-nine and three-tenths percent of the population living in the lower section thereof, or Ward 1 and 2, were of the Negro race, and that forty-seven and three-tenths percent of the population in the upper section thereof, or Wards 3, 4 and 5, were of the Negro race.

5. The 1956 school census for Darby Township, however, showed a shift in the racial difference, which indicated that the upper section comprising Wards 3, 4 and 5 had only a Negro school population of four and seven-tenths percent, and that the Negro school population of the lower section comprising Wards 1 and 2 would be ninety-five and six-tenths percent.

6. In this same 1956 census, the school population of the upper section of Darby Township for children up to seventeen years of age totaled three thousand six hundred forty-one (3,641), of whom one hundred seventy-two (172) were of the Negro race. However, there were only one thousand four hundred eighty (1,480) attending public schools by virtue of the fact that the Catholic Parochial School took fifty-nine and two-tenths percent of the school population of two thousand one hundred sixty-one (2,161) pupils, two thousand one hundred fifty-three (2,153) of whom were white and eight of whom were Negro.

7. In the lower section of Darby Township, the school population as of 1956 was one thousand three hundred thirty-five (1,335), one thousand two hundred eighty (1,280) or ninety-five and nine-tenths percent of whom

were Negro, attending the public schools and seventy-two were attending Parochial School, fifty-three of whom were Negro and nineteen of whom were white. This leaves one thousand four hundred eighty (1,480) public school students in the upper section as opposed to one thousand two hundred sixty-three (1,263) public school students in the lower section.

8. On September 11, 1952, the defendant, School District of the Township of Darby, by formal action of the Board of Directors—all of the members of the Board present being of the Negro race—determined that a section of a plot of land already acquired at Ashland and Bartram Avenues in what has been described as the upper section of Darby Township School District comprising Wards 3, 4 and 5 be reserved for a site for a possible future junior high school.

9. A great many factors were considered by the Board in the determination of the site for the junior high school to be located in the upper section of the Township—the influx of population of school age; requirements for junior high school facilities; the census for 1953 which showed a population of eight thousand six hundred eight (8,608) for the whole of Darby Township with five thousand four hundred thirty-nine (5,439) settled in the upper or northern section in Wards 3, 4 and 5 and three thousand one hundred seventy (3,170) in the southern section, or Wards 1 and 2; the report on where the school population for a junior high school was presently located and where the projected school population for 1959 and 1960 would be located, as well as consideration of the fact that representatives of civic associations had been called to meetings for the purpose of discussing the location of the proposed site; and the further fact that while a large number of the school population was attending Catholic Parochial School, it was thought that with the erection of a fine, new building

with modern facilities, that a number of pupils would return to the public school system and enter the junior high school, or at least provision should be made for such eventuality.

10. The record discloses in no instance a single iota of testimony that the consideration of the Darby Township School District Board, in the selection of the site for the proposed new junior high school and its construction thereon, was motivated by any racial discrimination whatsoever, and the record is equally clear concerning the Department of Public Instruction, State Council of Education and the State Public Building Authority, as well as every other defendant here of record.

11. The Department of Public Instruction and the State Council of Education exercise broad supervisory powers in a general way, but the actual administration of the school system in Pennsylvania is in the hands of the local school authorities (Art. 5 of the Public School Code of 1949, 24 P. S. §§ 5-501 et seq.).

12. The Delaware County Plan, which envisions school administrative units for all of Delaware County, was formulated by the Delaware County School Directors in conjunction with the local authorities, and was approved by the State Council of Education, and all local school board secretaries were notified by letter dated July 22, 1953.

13. Under the Plan, Darby Borough and Darby Township are joined as Administrative Unit Number Nine. The Plan provides for two elementary school attendance areas in Darby Township, one in the upper section and one in the lower section and makes all of Darby Township one junior high school attendance area and joins Darby Township with Darby Borough as one single high school attendance area under the Plan.

14. Administrative Unit Number Five under the Plan embraces Colwyn Borough, Collingdale Borough, Folcroft Borough and Sharon Hill Borough, all contiguous, each to

the other, and comprised of a school population which is almost entirely white.

15. The Plan itself is not self-executing, but provides for its implementation, that is, for the realization of the administrative units set forth in it by three methods, to wit, joinder, unior or merger, the former being accomplished by the vote of the school districts concerned and the latter two by submitting the proposals in the Plan to the electorate for their approval.

16. The State Public School Building Authority, which is one of the defendants herein, is a public corporation and a governmental instrumentality of the Commonwealth of Pennsylvania, which was created for the purpose of constructing, improving, maintaining and operating public school buildings as part of the school system of the Commonwealth of Pennsylvania under the jurisdiction of the Department of Public Instruction, has approved a deed to it, executed and acknowledged by the proper officers of the School District of Darby Township of the site in the upper section of Darby Township on which the new Darby Township Junior High School is to be located, but the deed has not as yet been recorded by reason of the present suit; further the authority has contracted to lease the site of the school, when completed, to the School District of Darby Township, and has prepared to advertise for bids for the construction of the school.

17. There is a pressing necessity for a new junior high school in Darby Township, since the present junior high school located in the lower section of the Township is inadequate for housing pupils and is in a rather bad state of deterioration. The present Plan of the Darby Township School Board contemplated remedying the overcrowding in the lower section by using the present junior high school for intermediate grades. Additionally, if the injunctive process prevents the completion of the proposed junior high

school and a new application is required for a different project, it will have to take its place behind some five hundred and eighteen pending applications, and no state reimbursements for new projects would be available until 1962. The present financing arrangements called for a three percent interest rate with a total cost to Darby Township of one million eight hundred eighty-seven thousand four hundred twenty-four dollars ($1,887,424), and if the District cannot participate in the State reimbursement presently allocated to it and would proceed in the open market, it would have to pay an interest rate of at least four and one-half percent, which would be an increased cost to the taxpayers of more than eight hundred eighty thousand dollars ($880,000).

DISCUSSION

There are two contentions posed by the injunction herein sought. The first involves the location of a new junior high school to be constructed in Darby Township, which, as has been indicated, comprises two non-contiguous areas—the upper section with a predominantly white population and the lower section with a predominantly Negro population, and it is alleged that the location of the said new junior high school in the upper section of Darby Township is discriminatory of the rights of the Negro population in the Township.

The second contention is that the Delaware County Plan for the reorganization of administrative units is likewise racially discriminatory, since Administrative Unit Number Nine groups together under the Plan, Darby Township and Darby Borough, which contain a relatively large percentage of Negroes as well in the general population and the school population. This alignment groups a large Negro population together, even though they are non-contiguous and are separated from each other by the school districts of Collingdale, Sharon Hill and Colwyn, which is

Administrative Unit Number Five, and which is predominately white.

With respect to this second contention, the Court herewith holds in abeyance and retains jurisdiction with respect thereto, because the State Superintendent of Public Instruction has advised that the Delaware County Plan will be reconsidered at a meeting of the State Council of Education in September, insofar as Administrative Units Numbers Five and Nine are concerned, and since there is no immediacy with respect to the approval or disapproval of the Plan as such, the Court will await the decision of the State Council of Education's decision with respect to them.

The problem of the construction of the new junior high school, however, is one of great urgency, as has been indicated by the findings of facts, for if this construction were held up for even a relatively short time, it might possibly mean that the moneys for this construction would be withdrawn, and in that event, the loss to Darby Township School District would be well over three-quarters of a million dollars, by virtue of its having to pay higher interest rates elsewhere, and the very great possibility that construction of the new junior high school would be delayed at least two and possibly five years. The consequences which would flow from the issuance of an injunction here would be a distinct blow to education in the Darby Township School District.

The first point to be disposed of is the allegation that this Court should have convened a three-man Court to dispose of the constitutional question here involved as provided for in 28 U.S.C. § 2282. However, while originally, the plaintiffs' complaint could be interpreted as an attack on the constitutionality of the Public School Code of Pennsylvania, after filing two additional amended complaints, counsel stated openly that he was not attacking the constitutionality of any statute as such, but was merely attacking the acts and practices of the various defendants named, and especially the acts and practices of the defendants in the application of §§ 261 and 1701 of the Public School Code of

1949. In other words, it is clear from the record that he is attacking merely the rules and procedures, as well as the method of enforcement provided under the Public School Code of 1949 and not the statute itself. Such situation does not call for the convening of a three-man Court, but can be proceeded in the District Court before a single judge. *Robert Webb v. United States of America*, 3rd Cir., Civil Action No. 22,638, opinion filed June 17, 1957.

The problem here involved is a relatively simple one, although a rather formidable record has been made, since the Court granted plaintiffs a wide latitude in view of the current constitutional controversies concerning segregation and discrimnation, and every opportunity was afforded to them to bring upon the record any showing thereof. However, the record is barren of such a showing. The plaintiff continually adverted, throughout the trial and during argument, to the recent cases under the Equal Protection Clause of the Fourteenth Amendment, *Brown v. Board of Education of Topeka*, 349 U.S. 294; *Clemons v. Board of Education of Hillsboro*, 228 F.2d 853, as well as *Board of Education of the School District of the City of Dayton v. State, ex rel. Reese*, 114 Ohio State 188, 151 N.E. 39. However, none of these cases is applicable to the factual situation here involved. Here, all junior high school students in Darby Township, Negro and white, will have an opportunity to attend the proposed new junior high school, and, while it is to be located in the upper section of the Township rather than the lower section, no matter in which section of the non-contiguous Township it is located, pupils of one or the other section must go by bus some two miles in order to attend, and, although the showing is clear that by far the larger number of junior high school students are Negroes in the lower section, if the site selected were in the lower section, it would compel all junior high school pupils, both Negro and white, to go by bus to the lower section. So, it amounts to solely, it seems to the Court, that the plaintiffs' complaint is largely one of inconvenience. It may

well be that the final determination is not the best site that could be selected, but this Court has no authority to review the actions of the local school authorities in selecting a site for the location of the school, since the location of the school is primarily a question to be decided by the Local Board of School Directors, and even a State Court could only interfere when there is such a manifest abuse and the action of the Board amounts to arbitrary will and caprice. *Spann v. Joint Board of School Directors*, 381 Pa. 338, *Regan v. Stoddard*, 361 Pa. 469. Here, even abuse of discretion was not shown, even though one might feel that if he had chosen the site, he would have located it somewhere else in the School District.

Since the Court has held in abeyance the regulations of the Delaware County Plan respecting Administrative Units Numbers Five and Nine, such action, as has been indicated, does not preclude the Court from disposing of the question of the selection of the site and the proposed construction of a junior high school in the upper section of Darby Township School District on the basis of racial discrimination. The Deleware County Plan is a proposed grouping of school districts and is at best only a hope, because the implementation of the Plan must be done either by a vote of the electorate or by resolution of the various boards contemplated within the group. The Borough of Darby, which is the other administrative unit in Unit Number Nine under the Plan is in no wise here concerned, since Darby Township School District is a school attendance area for a junior high school in itself and in reality Administrative Unit Number Nine concerns itself only on the senior high school level, and though it might be possible that at some future date some portion of Darby Township would be joined with another unit as a school attendance area, we cannot envision that which might possibly happen in the future, but must concern ourselves solely with the conditions as they obtained at the time the cause of action was brought.

CONCLUSIONS OF LAW

1. The parties are properly before the Court, and the Court has jurisdiction of the subject matter herein contained by reason of the fact that the action is brought under the Fourteenth Amendment to the Constitution, § 1, and Title 42 of the United States Code § 1981 and 1983.

2. None of the defendants herein named was in any way racially motivated, nor was any discrimination whatsoever regarding race exercised by any or all of them in the selection of the site or the approval given for the construction of a proposed junior high school in the upper section of Darby Township.

3. The proposed construction of the new junior high school, while in conformity with the Delaware County Plan, and approved by the Department of Public Instruction, the State Council of Education and the State Public School Building Authority of Pennsylvania, such conformity coincides with only one facet of the Delaware County Plan, and since Darby Township is a proper school attendance area for a junior high schol and has been so declared, its construction in no wise approves of the Plan, for it does not involve the other administrative unit thereof, Darby Borough, and can stand on its own merit, since the Administrative Unit Number Nine as such does not become involved, as it concerns itself primarily with functioning at the senior high school level.

Acordingly, the Court will retain jurisdiction in the matter concerning the alleged unconstitutionality of the acts and practices under the Delaware County Plan, but herewith denies the application for an injunction to restrain the proposed construction of the junior high school in the upper section of Darby Township. With respect thereto, an appropriate order, when submitted, will be signed by the Court.

ORDER AND JUDGMENT

AND NOW, to wit, this 7th day of September, 1957, in conformity with this Court's Opinion dated August 27, 1957, and pursuant to the provisions of F.R.C.P. 54 (b), the Court determines that the relief sought by the Plaintiffs is multiple, that the relief sought by Plaintiffs to enjoin Darby Township School District and other Defendants from taking any action or refraining from taking any action contemplated or necessary in connection with the conveyance of land, the leasing thereof, the location, construction, erection and financing of the proposed Junior High School in the northern section of Darby Township School District, is unrelated to the other relief prayed for by the Plaintiffs, and that there is no just reason to delay and, to avoid irreparable damage, justice requires the entry of a final judgment with respect thereto, and accordingly, IT IS HEREBY ORDERED as follows:

(1) Plaintiffs' Application for a Preliminary and Final Injunction to restrain any one or more of the Defendants from taking any action or refraining from taking any action either contemplated or deemed necessary in connection with the conveyance of land, the leasing thereof, the location, construction, erection and financing of the proposed Junior High School in the northern section of Darby Township School District, is denied, and final judgment with respect thereto is entered against the Plaintiffs, and in favor of all of the Defendants.

(2) The State Public School Building Authority of Pennsylvania not being involved with respect to other relief sought by the Plaintiffs, over which the Court retains jurisdiction, as hereinafter set forth, final judgment as to it is entered in its favor, and against the Plaintiffs, and the Complaint is dismissed as to it.

(3) The School District of Darby Township, the latter's Board of School Directors, James E. Stephens, John F. Ready, Thomas V. Studevan, Thomas J. Reilly, John W. Phillips, William H. Polk, Jr., and Mrs. Rosalie Rupert, the members of said Board, and Donald L. Snively, its Supervising Principal, not being involved with respect to other relief sought by the Plaintiff, over which the Court retains jurisdiction, as hereinafter set forth, final judgment as to them is entered in their favor, and against the Plaintiffs, and the Complaint is dismissed as to them.

(4) The Court retains jurisdiction over all of Plaintiffs' claims for relief which are not the subject of final order and judgment, pursuant to Paragraphs (1), (2) and (3) hereof and as against all Defendants except those mentioned in Paragraphs (2) and (3) hereof.

(5) The costs of the School District of Darby Township, its Board of School Directors, the individual members thereof and its Supervising Principal, are allowed against the Plaintiffs.

BY THE COURT:

s J. CULLEN GANEY

Judge

AMENDED FINDINGS OF FACTS

GANEY, *J.* September 9, 1957

In connection with the above mentioned matter, the following amended findings of facts are made:

1. In the last line of the second finding of fact, the word "independent" is to be changed to the word "separate."

2. Finding of fact number twelve is amended by eliminating the phrase in lines three and four thereof the words "in conjunction with the local school authorities."

3. Finding of fact number fifteen is eliminated entirely, and the following amended finding of fact is to be substituted in lieu thereof: "The plan itself is not self-executing, but provides for its implementation and the reorganization of attendance areas and administrative units in the plan, and can only be made effective after a proposal in connection therewith has been submitted to and approved by the majority of the electorate of each district concerned. Such a proposal may be initiated in either of two methods, to wit, union or merger proceeding, the former being initiated by the voluntary action of the School Districts concerned, and the latter being initiated by the County Board of School Directors. A third method designated as a jointure proceeding, which is an agreement between the Board of School Directors of the school districts involved, provides only for the operation of joint schools or departments on such terms as may be agreed upon, but neither changes the boundaries of existing school districts nor consolidates liabilities and assets."

OPINION SUR REQUEST TO AMEND FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND MOTION FOR NEW TRIAL

GANEY, *J.* October 4, 1957

This concerns itself with a motion to amend the Court's Findings of Facts filed on August 27, 1957, and in connection therewith, the following disposition is made of the suggested amended findings:

1. The third Finding of Fact in the Court's opinion, sets forth primarily that Darby Township constituted two non-contiguous sections which have been in existence since around 1890; more specifically, part of it was annexed in 1921 to Collingdale Borough; in 1922 Folcroft Borough was annexed, and in 1923 part of it was annexed to Glenolden Borough, but, as has been indicated, it has been non-contiguous since 1890.

2. Plaintiffs' request No. 2 is denied.

3. Plaintiffs' request No. 3 is denied, since the record discloses that school population means school and pre-school pupils.

4. Plaintiffs' request No. 4 is denied, as being repetitious of phrasing, as set forth in the third suggested finding.

5. Plaintiffs' request No. 5 is denied.

6. Plaintiffs' request No. 6 is denied.

7. Plaintiffs' request No. 7 is denied.

In connection with the statement in the plaintiffs' position headed Further Amended Findings of Facts, they are disposed of as follows:

1. The requested findings are not necessary to the determination of the issue, since they concern themselves

with actual school population as of May 1, 1957. The School Board of Darby Township on September 11, 1952, when it made its judgment with respect to the selection of a proposed junior high school, had to take into consideration all of Darby Township school population—those attending public schools as well as those attending Parochial Schools and those of prospective school age, as well as the possibilities for the future which these and kindred problems such as finances and economics posed.

2. Plaintiffs' request No. 2 is denied.

3. Plaintiffs' request No. 3 is denied.

4. Plaintiffs' request No. 4 is discussed in finding No. 1 herein.

5. Plaintiffs' request No. 5 is denied.

6. Plaintiffs' request No. 6 is denied.

7. Plaintiffs' request No. 7 is denied.

8. It is a fact that Darby Borough, through the office of its secretary, George W. Atkins, objected on September 16, 1953 to the proposed linking of it with Darby Township in Administrative Unit Number Nine. However, this fact has no bearing on the immediate issue, which concerns the issuance of an injunction to prohibit the construction of the junior high school in the upper section of Darby Township, and this consideration is reserved for the disposition of the issue posed under the proposed County Plan.

The motion to delete Conclusions of Law No. 2 and No. 3 is denied.

The motion for a new trial is likewise denied.

FINDINGS, CONCLUSIONS, ORDER AND JUDGMENT

AND NOW, to wit, this 19th day of December, 1957, the Court, pursuant to F.R.C.P. 54(b) having retained jurisdiction over all of the Plaintiffs' claims for relief which were not disposed of by this Court's Order and Judgment of September 9, 1957, and over all Defendants except those in whose favor final judgment was entered in said prior Order and Judgment, and the record of retained jurisdiction having been reopened upon due and proper application and competent and uncontradicted evidence introduced of the withdrawal of approval by the State Council of Education of the Commonwealth of Pennsylvania of the previously existing Delaware County Plan for the merger of School Districts and for the reorganization of Attendance Areas and Administrative Units (hereinafter called Delaware County Plan), the validity of only two Units of which Plan was challenged by the Plaintiffs, the Court makes the following Findings of Fact and Conclusions of law, to wit:

(A) There is not now in existence any Delaware County Plan as contemplated and required by the Pennsylvania Public School Code of 1949.

(B) The Plaintiffs in this proceeding have not challenged the constitutionality of any Pennsylvania Statutes, but only the application of the pre-existing Delaware County Plan insofar as it affected Units 5 and 9 thereof.

(C) Plaintiffs' claims for relief of which this Court retained jurisdiction, relate only to the partial invalidity of what is no longer in existence, and such questions are now moot.

(D) There is now no Federal questions before this Court justifying this Court retaining further jurisdiction.

(E) No useful purpose would be served by the Court passing upon the requests for Findings of Fact and Conclusions of Law submitted by the litigants, and accordingly, IT IS HEREBY ORDERED AS FOLLOWS:

(1) Plaintiffs' applications (a) to have the Delaware County Plan declared null and void, (b) for a preliminary and final injunction against any one or more of the Defendants to restrain them from formulating, approving or executing any School District Reorganization Plan, and (c) any other of Plaintiffs' claims for relief over which this Court retained jurisdiction, are all denied, and final judgment with respect thereto is hereby entered against the Plaintiffs, and in favor of the several Defendants, to wit:

Department of Public Instruction of Pennsylvania, Dr. Charles H. Boehm, Superintendent of Public Instruction of the Commonwealth of Pennsylvania.

and

State Council of Education of the Commonwealth of Pennsylvania.

G. Baker Thompson, Superintendent of Public Schools of Delaware County.

County Board of School Directors and the individual members thereof, to wit:

Charles H. Russell
Norman K. Seiple
H. Letcher Cooper
Edith J. Zarr
Theodore S. Fetter
L. G. Livingston
Donald P. Jones

The School District of the Borough of Folcroft, and the individual members of its Board of School Directors, to wit:

Dorothy Greenlaw
E. E. Parkin
Richard C. Palmer
George F. Hoffman
Robert Kelly
and
Samuel D. Craven, its Supervising Principal.

The School District of the Borough of Sharon Hill, its Board of School Directors and the individual members thereof, to wit:

Norman K. Seiple
Joseph S. Weaver
Frank A. Yeager
Edward C. Callahan
William L. Heesen
William H. Eggers
Franklin J. Koch,
and
Dr. Vernon H. W. Dessenberger, its Supervising Principal.

The School District of the Borough of Collingdale, its Board of School Directors and the individual members thereof, to wit:

John H. Alexander
Mrs. Sarah B. Torrens
William Partridge
Alfred B. Cawthrone
James D. McBride
Dr. Raymond C. Saalbach,
and
F. E. Stengle, its Superintendent.

The School District of the Borough of Colwyn, its Board of School Directors and the individual members thereof, to wit:

Joseph H. Brehm
John L. Furterer
Clayton H. Latshaw
Charles G. Hild
Joseph Archibald,
and
DeWitt L. Dietrich, its Principal—Colwyn Public School.

2. Each of the litigants, both Plaintiffs and Defendants shall bear their own costs.

By THE COURT:

/s/ J. CULLEN GANEY
Judge

ORDER

AND NOW, to wit: November 5th, 1957, it is ORDERED that plaintiffs' request to amend findings of fact and conclusions of law is DENIED except to the extent they are modified by the opinion filed October 4th, 1957, and it is further

ORDERED that plaintiffs' motion for a new trial be and the same is hereby DENIED.

By THE COURT

J. CULLEN GANEY, *J.*

ORDER

AND NOW, this fifth day of November, 1957, It is ORDERED by this court that plaintiffs' motions for supplemental relief and for extension of time within which to file notice of appeal be, and the same are hereby, denied.

AND It is further ORDERED that their motion requesting that this court rule on the issue regarding the constitutionality of the "County Plan" be, and the same hereby, denied, and decision on that issue will continue to be held in abeyance.

J. CULLEN GANEY, *J.*

FILED NOV. 5, 1957

APPENDIX "B"

Opinions, Judgments and Orders In the United States Court of Appeals for the Third Circuit

ORDER

Present: MARIS, McLAUGHLIN and STALEY, Circuit Judges.

Upon consideration of the motion by the School District of the Township of Darby, Delaware County, Pennsylvania, for leave to include in the record on appeal the record of subsequent proceedings in the District Court; and after hearing;

It is ORDERED that the motion be, and it is hereby granted.

By THE COURT,
MARIS, *Circuit Judge*

January 6, 1958

OPINION OF THE COURT

(Filed February 5, 1958)

By BIGGS, *Chief Judge.*

The plaintiffs, minor Negro children, by their parents as guardians *ad litem*, and the parents themselves, all residents of Darby Township, Delaware County, Pennsylvania, brought suit in the court below, invoking jurisdiction under Sections 1331 and 1343, Title 28, U.S.C., under Sections 1981 and 1983, 42 U.S.C., and under the Fourteenth Amendment. The plaintiffs allege that because they are

Negroes they have been discriminated against as to the location of a new junior high school which the defendants, the Department of Public Instruction of Pennsylvania, the Superintendent of Public Instruction of Pennsylvania, the Board of School Directors of Delaware County, the Delaware County Superintendent of Schools, the Board of School Directors of Darby Township, and the individuals comprising these authorities, have decided to locate in the upper or northern segment of Darby Township instead of in its lower or southern segment, the Township being comprised of two non-contiguous areas divided by certain boroughs of Delaware County.

The plaintiffs allege that the asserted discriminatory action has come to pass because of a "Delaware County Plan", 24 P.S.Pa. 2-261 to 2-264, proposed by the school authorities referred to and their individual members, and that the defendants have failed or refused to include the plaintiffs and other Negro student residents of Wards 1 and 2, constituting the lower or southern segment of Darby Township, in the Delaware County Plan by electing to place the new junior high school in Wards 3, 4 and 5, constituting the upper or northern segment of Darby Township on land already purchased, despite the fact that the present or old junior high school is now situated in the lower or southern segment of the Township and has been so situated for many years. The result, the plaintiffs allege, will be to cause Negro students to be transported two and a half miles by bus or other conveyance across contiguous boroughs, past high schools as distinguished from junior high schools, despite the fact the Negro population of Darby Township is situated largely in its lower or southern segment, thus effecting by gerrymandering a discriminatory school system based on segregation by race.

The prayers of the complaint and the amendments thereto seek to enjoin the building of the proposed new junior high school in the upper or northern segment of Darby Township and the effecting of the Delaware County Plan.

Some of the defendants in their answers first sought the interposition of a three-judge statutory court to dispose of the case pursuant to the provisions of Sections 2282 and 2284, 28 U. S. C., apparently because of the view that the plaintiffs were seeking to test the constitutionality of Pennsylvania statutes, but these prayers were not pressed and the case was heard below by a court comprised by a single judge. It appears that the constitutionality of the statutes of Pennsylvania is not attacked by the plaintiffs but rather the method in which the statutes were or are being applied by the school authorities. We agree that the case was one to be heard by a single judge. Mere attack on regulations or method of enforcement of a statute is not sufficient to justify the interposition of a three-judge court. Ex parte Bransford, 310 U. S. 354 (1939), Williams Jameson & Co. v. Morganthou, 307 U. S. 171 (1938).

After answers were filed extensive testimony was taken on hearings for the preliminary and final injunctive relief sought by the plaintiffs. The court below handed down an opinion on August 27, 1957, F. Supp. . It appears from the opinion and the findings of fact that the court was of the view that the relief sought by the plaintiffs was "multiple" specifically that the relief sought by the plaintiffs to enjoin the Board of School Directors of Darby Township and the other defendants from taking any action or refraining from taking any action contemplated or necessary in connection with the conveyance of land, the leasing thereof, the location, construction, erection and financing of the new junior high school in the upper or northern segment of Darby Township, was unrelated to other relief sought by the plaintiffs which related primarily to the administrative units and attendance areas in Delaware County under the Delaware County Plan. The court below, making reference to Rule 54(b), Fed. R. Civ. Proc., 28 U. S. C., and an express determination that there was no just reason for delay, on September 7, 1957 entered judgment on the claim first described in favor of all the

defendants and against all the plaintiffs denying the injunctive relief sought by the plaintiffs while retaining jurisdiction of the second claim referred to above. The judgment of September 7, 1957 is appealed from.[1]

The plaintiffs have bottomed their case squarely on the issue that they have been discriminated against and segregated because of their race by the proposed location of the new junior high school. Unless this issue be proved a United States court has no authority to intervene in a domestic difficulty as to where a school should be located in a township. The location of schools assuredly is one for state school authorities and local school boards; for state, not national courts, unless there be a deprivation of rights guaranteed by the Fourteenth Amendment. The plaintiffs have failed to prove their case. The court below stated, Finding of Fact No. 10: "The record discloses in no instance a single iota of testimony that the consideration of the Darby Township School District Board, in the selection of the site for the proposed new junior high school and its construction thereon, was motivated by any racial discrimination whatsoever, and the record is equally clear concerning the Department of Public Instruction, State Council of Education and the State Public Building Authority, as well as every other defendant here of record."

This is indeed a strong statement for a court to make

[1] Later, on December 19, 1957, the court below entered another judgment disposing of the other claim which the court below stated as relating to attendance areas and administrative units under the Delaware County Plan concerning which expressly it had reserved jurisdiction. Executive relief was granted the plaintiffs and the Delaware County Plan was disapproved by the Pennsylvania School Authorities after the entry of the court's judgment on September 9, 1957. The court concluded that the claim reserved had become moot and gave final judgment of it in favor of all the defendants and against all the plaintiffs. For the reasons which appear in this opinion we need not pass on the validity of this disposition.

The order of the court below of December 19, 1957 was included in the record of this appeal by order of this court. The order has not been appealed from.

but it is probably not too strong. While it is clear that the greater portion of the Negro population of Darby Township resides in the lower or southern segment it is equally apparent that a great many factors had to be considered and were considered by the Board of School Directors of Darby Township and other officials in determining the location of the new junior high school. Some of these factors are set out in detail in the findings of the court below[2] and need not be discussed with particularity in this opinion. It is clear that in the light of all the factors the Board of School Directors of Darby Township were justified in their proposal to put the new junior high school in the upper or northern segment of the Township. There is no evidence of discrimination or of segregation by reason of race. Segregation or discrimination is not shown by the mere fact that there are presently more Negro students in the lower or southern segment of Darby Township than in its upper or northern segment. Standing alone such a factor will not support an inference of discrimination or segregation.

[2] Finding of Fact No. 9, for example, is as follows: "A great many factors were considered by the Board [of School Directors of Darby Township] in the determination of the site for the junior high school to be located in the upper section of the Township—the influx of population of school age; requirements for junior high school facilities; the census for 1953 which showed a population of eight thousand six hundred eight (8,608) for the whole of Darby Township with five thousand four hundred thirty-nine (5,439) settled in the upper or northern section in Wards 3, 4 and 5 and three thousand one hundred seventy (3,170) in the southern section, or Wards 1 and 2; the report on where the school population for a junior high school was presently located and where the projected school population for 1959 and 1960 would be located, as well as a consideration of the fact that representatives of civic associations had been called to meetings for the purpose of discussing the location of the proposed site; and the further fact that while a large number of the school population was attending Catholic Parochial School, it was thought that with the erection of a fine, new building with modern facilities, that a number of pupils would return to the public school system and enter the junior high school, or at least provision should be made for such eventuality."

On this record we, like the court below, can perceive no intent to discriminate or to segregate. One of the startling facts is that at the meeting of September 11, 1952 of the Board, the meeting at which definitive action was taken determining the site for the future junior high school, all of the members of the Board present were Negroes. We are convinced that the Board of School Directors of Darby Township acted in good faith and with a proper exercise of administrative judgment. In any event we cannot say that the findings of fact of the court below were clearly erroneous, Rule 52(a), Fed. R. Civ. Proc., 28 U. S. C., and we cannot reverse the order of the court below appealed from.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

February 5, 1958

ORDER

Present: BIGGS, *Chief Judge*; KALODNER, *Circuit Judge*, and WRIGHT, *District Judge*.

AND NOW, to wit, this 14th day of March, 1958, it is ORDERED that the opinion filed herein on February 5, 1958 be and the same hereby is amended by striking out the first sentence of the first full paragraph commencing on page 2, lines 14 to 27, inclusive, and substituting in lieu thereof the following: "The plaintiffs allege that the 'Delaware County Plan', 24 P. S. Pa. 2-261 to 2-264, proposed by the school authorities referred to and their individual members has resulted in a practical segregation of Negro students, residents of Wards 1 and 2, constituting the lower or southern segment of Darby Township, by electing to place the new junior high school in Wards 3, 4 and 5, conconstituting the upper or northern segment of Darby Township on land already purchased, despite the fact that the present or old junior high school is now situated in the lower or southern segment of the Township and has been so situated for many years."

By THE COURT,

BIGGS,
Chief Judge.

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MAY 14 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 976

JOHN A. SEALY, JR. ET AL.,

Petitioners

vs.

DEPARTMENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA ET AL.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOIS G. FORER
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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 159 F. Supp. 561 (1957). The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court under §1254 of the Judicial Code, 62 Stat. 928 (1948), 28 U.S.C. §1254 (1952). The decision of the Court of Appeals was entered on February 5, 1958. The time within which the petition for writ of certiorari might be filed expires on May 6, 1958.

STATUTE INVOLVED

Petitioner alleges that defendants have denied him his rights under the Third Civil Rights Act of April 20, 1871, 17 Stat. 13, now Rev. Stat. §1979, 42 U.S.C. §1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED FOR REVIEW

Does the selection by the duly constituted local authorities of a site in the upper end or tract of the township for a new junior high school to serve the entire township in a township consisting of two non-contiguous tracts in which the population of the upper tract is 5% Negro and 95% White and the population of the lower tract is 89.3% Negro, when there is no evidence of intent by the members of the school board making this determination to discriminate, violate the rights of Negro children and their parents residing in the lower tract?

REASONS FOR DENYING THE WRIT

No claim is made in the petition before this Court that the constitutionality of any Pennsylvania statute is drawn into question. Indeed, the Pennsylvania School Code of March 10, 1949, P. L. 30, Art. XIII, Sec. 1310, prohibits segregation or discrimination.

The selection of the site for a new integrated junior high school is not in its effect upon the composition of the school population racially discriminatory. Under the peculiar circumstances of the case at bar, namely, the division of the township into two non-contiguous tracts, it is apparent that the selection of a location in either tract will work some inconvenience upon the residents of the other tract. The preexisting racial pattern of the two tracts causes the resulting inevitable inconvenience to rest more heavily upon either the predominantly White or the predominantly Negro group. The population of the upper section is 95% White. The population of the lower section is 89.3% Negro. No solution is possible which could avoid such a result. Consequently, the selection of this school site does not violate the rights of any residents of the township. The requirements set forth by this Court in *Brown v. Board of Education*, 394 U. S. 294, have been fully met.

The selection of a school site involves many factors. The exercise of this judgment upon the part of the school board does not raise a question of the violation of federal rights in the absence of some showing of

an intent upon the part of the school board to discriminate. The record clearly shows that the selection of the site by all Negro members of the Board was not motivated by an intent to discriminate against any racial group.

CONCLUSION

It is clear that petitioner has failed to state a cause of action under the Civil Rights Act. No substantial question of public importance is involved. It is, therefore, urged that the petition for the writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 976

JOHN A. SEALY, JR., et al.,

Petitioner,

v.

DEPARTMENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, et al.,

Respondents

BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, BY RESPONDENTS, THE SCHOOL DISTRICT OF THE TOWNSHIP OF DARBY; ITS BOARD OF SCHOOL DIRECTORS, JAMES E. STEPHENS, et al., AND DONALD L. SNIVELY, SUPERINTENDENT OF SCHOOLS.

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 159 F. Supp. 561 (1957). The opinion of the United States Court of Appeals for the Third Circuit is reported in 252 F 2nd 898 (1958).

JURISDICTION.

Petitioner invokes the jurisdiction of this Honorable Court under § 1254 of the Judicial Code, 62 Stat. 928 (1948) 28 U. S. C. § 1254 (1952). The decision of the Court of Appeals was entered on February 5, 1958. The petition was docketed May 5, 1958, the time for filing of which expired May 6, 1958.

STATEMENT OF THE CASE.

Petitioners' Statement of the Case is accepted except with respect to the following:

(Petition Page 6 Paragraph 2) Darby Township, in Delaware County, Pennsylvania, was incorporated in 1683 by William Penn's government. Other municipal entities were incorporated out of Darby Township as population increased and necessity arose for more immediate local government. Beginning with the incorporation of the Borough of Darby in 1853, the "carving" took place over a period of years ending with the Borough of Folcroft in 1922.

(Petition Page 7 first full Paragraph) Darby Township School District, a separate municipal entity whose boundaries are coterminous with those of Darby Township, was authorized to establish its own junior high school

in 1926, and erected and has operated and maintained such school since that date on an entirely integrated basis. Attendance of pupils, negro and white, at the location of the proposed junior high school would not necessitate the passing of predominantly white schools within the geographical limits of School District of Darby Township. Passing of predominantly white schools would, if any, be those schools which have been operated for many years by school districts other than School District of Darby Township.

ARGUMENT.

I.

We are concerned in the instant case with the selection of the site for a proposed new junior high school for the School District of the Township of Darby and the construction of a building thereon. The site was chosen at a meeting of the local school board when all members present were members of the negro race. Action taken by the Respondents in the various steps required by law in perfecting the building project and obtaining the necessary administrative approvals, fill over 1100 pages of a record where the "Court granted plaintiffs a wide latitude in view of the current constitutional controversies concerning segregation and discrimination" (Petitioners' Appendix "A", page 24), and where, as admitted by the Petitioners, "all of the evidence was before the Court on all issues" (Petitioners' Questions Presented IV, Page 5 of Petition), yet both the District Court and the Circuit Court Below found the record barren of any showing of discrimination or segregation.

The factual situation here involved,—where all students, both negro and white, are now attending the present junior high school, and will have an opportunity to attend the proposed new junior high school,—is not similar to the case of *Brown* v. *Board of Education of Topeka*, 349

U. S. 294, where segregation of whites and negroes was definitely established and conceded as such. There is no segregation in the School District of Darby Township, nor is there any allegation that there is or ever has been segregation. The Court Below did not decide a question on racial discrimination in a way in conflict with any decision of this Court requiring eliminaton of racial discrimination in the public schools with all deliberate speed. The District Court Below found as a fact that there was not a single iota of testimony that the actions of any Respondent were motivated by any racial discrimination whatsoever. (Finding of Fact No. 10, Petitioners' Appendix "A", page 20.) And in fact, the District Court Below definitely stated that the recent cases under the Equal Protection clause of the Fourteenth Amendment continually adverted to throughout the trial and during argument had no applicability to the factual situation here involved. (Petitioners' Appendix "A", page 24.) The decision of the Court Below was in no way in conflict with the decisions of the Supreme Court of the United States. No court has ever decided that discrimination arises merely because a school building is placed in one part of a school district and not in another part of the same school district, where there is no allegation whatsoever of segregation.

II. III.

On September 11, 1952, the Respondent School District of the Township of Darby determined upon a plot of land for a site for its possible future junior high school. After all the preliminaries of approvals, building plans and financing had been perfected and made ready to advertise for construction bids (Findings of Fact No. 8 Petitioners' Appendix "A", page 19; and Finding of Fact No. 16, Petitioners' Appendix "A", page 21), this suit was instituted in April 1957.

The Bill of Complaint seeks first,—to restrain the location and construction of the new junior high school, and second,—to set aside the so-called Delaware County Plan for reorganization of administrative units; both on the ground of racial discrimination. Trial was held before the District Court Below in June, 1957. That Court's Order was entered on September 7, 1957, determining that the relief in the first instance was unrelated to the other relief. This was substantiated in open court on December 11, 1957, when evidence was produced of a formal resolution adopted by the Pennsylvania State Council of Education withdrawing its former approval of the Delaware County Plan and inviting a survey to be undertaken and completed not later than February 1, 1958 for an alternate Plan for further consideration. (Notes of Testimony p. 1122).

The District Court Below recognized that on the one hand there was a pressing need for the new building and possible irreparable damage by reason of further delay in its construction, and that on the other hand the Delaware County Plan was indefinite and unconcluded, as the Court found:

> "15. The Plan itself is not self-executing, but provides for its implementations, that is, for the realization of the administrative units set forth in it by three methods, to wit, joinder, union or merger, the former being accomplished by the vote of the school districts concerned and the latter two by submitting the proposals in the Plan to the electorate for their approval." (Finding of Fact No. 15 Petitioners' Appendix "A", page 25.)

In its Opinion the District Court Below states "The Delaware County Plan is a proposed grouping of school districts, and is at best only a hope, because the implementation of the Plan must be done either by a vote of the electorate or by resolution of the various boards con-

templated within the group." (Petitioners' Appendix "A", page 25.)

The District Court Below considered the two claims multiple claims for relief, the one definite, positive and urgent, the other indefinite and uncertain.

The determination of judgment upon one or more but less than all of the claims, where multiple relief is sought, is one for the court under Rule 54 (b) F. R. C. P., upon its express determination that there is no just reason for delay. The District Court Below found that there is a pressing necessity for a new junior high school since the present junior high school is inadequate and in a rather bad state of deterioration; and further that if the injunctive process prevents the completion of the proposed junior high school and a new application is made to the Commonwealth of Pennsylvania for the right of reimbursement for a different project, it will have to take its place behind some five hundred and eighteen pending applications and no state reimbursement for new projects would be available until 1962; that the present financing arrangements called for a three per cent interest rate with a total cost to School District of Darby Township of $1,887,424.00 and if the district cannot participate in the state reimbursement presently allocated to it and would proceed in the open market, it might have to pay an interest rate of as much as 4½%, which would be an increased cost to the taxpayers of more than $880,000.00. (Finding of Fact No. 17, Petitioners' Appendix "A", pp. 21 and 22). The District Court Below was indeed cognizant of the possible delay, with no just reason for it then, as now. Then, on August 27, 1957, the date of the Findings, and on September 7, 1957, in its Order and Judgment the District Court Below found " pursuant to the provisions of F. R. C. P. 54 (b) * * * there is no just reason to delay, and, to avoid irreparable damage, justice requires the entry of a final judgment with respect thereto" (Petitioners' Appendix "A", page 27). We submit there was no abuse of discretion.

Moreover the subsequent actions taken by the proper authorities as related in footnote 1 on page 40 of Judge Biggs' Opinion in the Circuit Court (Petitioners' Appendix "B", page 40), show that Petitioners' rights relative to the Delaware County Plan have not been foreclosed.

Official Opinion No. 19 of the Attorney General of Pennsylvania dated September 20, 1957, is foot noted into Petitioners' argument and urged as a basis for the relationship of the construction of the new junior high school to the status of the Delaware County Plan. This opinion of the Attorney General obviously does not support Petitioners' argument. Its language must be confined to the matter being determined by the Opinion, namely the right of the State Council of Education to withdraw approval of a County Plan, not as to any interpretation of the State Public School Building Authority Act, of July 5, 1947, P. L. 1217, as amended (24 Purdons Statutes § 791.1, *et seq*). The District Court Below held that the matters were not related, and the Circuit Court affirmed its judgment.

The facts in this case are not at all like those in the case of *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2nd 853, decided by United States Court of Appeals for the Sixth Circuit which involved arbitrary zoning for segregation purposes. There is no "zoning system" in the School District of Darby Township. There is no segregation whatsoever in the School District of Darby Township. The two parts of the School District have been separated for over 40 years, and the separation is geographical not racial. The placing of the junior high school in either part will work inconvenience to the other. Inconvenience is not discrimination. The students in one part of the school district have no fundamental rights to have a school building placed in that part, no matter what their color may be. Nor does a change in popula-

tion of one color in one part create discrimination, where there is no restriction whatsoever as to the students who attend the schools in the district.

IV.

The Petitioners sought relief on all claims based on the issue of racial discrimination. Petitioner in this Questions Presented IV of his Petition, admits that "all the evidence was before the Court on all issues" (Petition, page 5). Respondents have set forth in reply to Questions Presented I, the findings of the District Court particularly Finding of Fact No. 10 (Petitioners' Appendix "A", page 20) that "the record discloses in no instance a single iota of testimony that the consideration of the Darby Township School District Board, in the selection of the site for the proposed new junior high school and its construction thereon, was motivated by any racial discrimination whatsoever, and the record is equally clear concerning the Department of Public Instruction, State Council of Education, and the State Public Building Authority, as well as every other defendant of record." This finding is indeed all inclusive and sweeping and includes not only those respondents having to do with the selection of the site and the construction of the building, but also "every other defendant of record", not all of whom were concerned in the building program. As Chief Judge Biggs stated—"This is indeed a strong statement for a court to make but it is probably not too strong" (Petitioners' Appendix "B", pages 40-41), and further "On this record we, like the Court below, can perceive no intent to discriminate or to segregate" (Petitioners' Appendix "B", page 42). No segregation having been alleged and no discrimination having been found, there was no violation of the Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States.

Certainly with the positive statement in the finding of the District Court Below affirmed by the Circuit Court,

even if restricted to the claim respecting the building of the junior high school—no basis exists for the retention of jurisdiction over that claim until the claim concerning the County Plan, which is indefinite, "at best only a hope", is determined. Law, order and justice, should bar further delays to this pressing necessity for a new junior high school in the School District of Darby Township with the irreparable damage to the youth, negro and white, of this district.

CONCLUSION.

Petitioners have failed to show any violation of rights conferred upon them by the Constitution and laws of the United States and are consequently without standing in the Federal Courts. It is, therefore, urged that the petition for the writ of *certiorari* be denied.

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